Counsel:

PETER A. SCHEY*
CARLOS HOLGUIN
CENTER FOR HUMAN RIGHTS
& CONSTITUTIONAL LAW
256 South Occidental Blvd.
Los Angeles, CA 90057
(213) 388-8693
*Counsel of Record for Amici

RALPH SANTIAGO ABASCAL
STEPHEN A. ROSENBAUM
PAULINE GEE
CALIFORNIA RURAL LEGAL
ASSISTANCE
2111 Mission Street, # 401
San Francisco, Ca. 94110
(415) 864-3405

WAYNE H. MATELSKI
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave. NW
Washington, D.C. 20036
(202) 857-6340

ROBERT GIBBS
GIBBS, DOUGLAS,
THEILER, DRACHLER
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

MONTE B. LAKE
McGUINESS & WILLIAMS
1015 15th Street
Suite 1200
Washington, D.C. 20005
(202) 789-8500

STEWART KWOH
ASIAN PACIFIC AMERICAN
LEGAL CENTER
1010 S. Flower St., # 302
Los Angeles, CA 90015
(213) 748-2022

WILLIAM TAMAYO
ASIAN LAW
CAUCUS, INC.
468 Bush Street
San Francisco, Ca.
(415) 487-6897

RICHARD GARCIA
CENTRO DE ASUNTOS
MIGRATORIOS
815 3rd Ave., Suite 219
Chula Vista, CA 92010
(619) 426-6620

Attorneys for Amici Curiae

INTRODUCTION

The purpose of this brief is to describe the nature of several of the class actions that were filed in several district courts during the 1986-87 legalization application period.[1] Each case challenged regulations or policies of general applicability on statutory or Constitutional grounds. None sought judicial review of individual applications; indeed, nearly all of the plaintiffs in these cases either had not yet filed applications or, if they had, their applications had not yet been acted upon. All of these cases asserted jurisdiction under 28 U.S.C. § 1331 and 8 U.S.C § 1329.

There is a common characteristic reflected in all of these cases that is the result of the interplay between two provisions in IRCA. The first is the provision that imposes sanctions on employers who employ aliens that lack employment authorization.[2] The second are the provisions that grant a stay of deportation and employment authorization to legalization applicants who are prima facie eligible for legalization.[3] Since the regulations or policies challenged in each of the cases rendered class members ineligible as a matter of law, they were also automatically denied the statutory benefits of temporary work authorization and stays of deportation. While judicial review of "denials" of applications may be available under INA §§ 210(e) and 245A(f), these provisions obviously do not provide for judicial review of erroneous denials of the statutorily mandated grants of temporary stays of deportation and employment authorization. Furthermore, INS's refusal to issue temporary stays of deportation and employment authorization made judicial review under INA §§ 210(e) and 245A(f) highly illusory. The reason is simple---lacking the ability to work legally, most amnesty-eligible immigrants

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1 All parties have consented in writing to amici curiae's filing of this brief. See Exhibits 1 and 2 lodged herewith. All references to Exhibits, unless otherwise noted, are to amicus curiae's exhibits lodged concurrently herewith.

2 INA § 274A, 8 U.S.C. § 1324a.

3 INA §§ 210(d) & 245A(e), 8 U.S.C. §§ 1160(d) & 1255a(e).

would be driven out of the country by simple destitution before INS apprehension.

In every case we will address, the district court sustained the substantive challenge to the INS regulations or practices, or INS agreed to consent decrees granting effective relief. In virtually every case, INS's appeals to the courts of appeals have not contested the merits of the district court rulings but rather are limited to the jurisdiction of the district courts and their authority to grant equitable relief even if class members were injured as a result of the challenged regulations. In fact, in virtually every case INS subsequently (but too late) modified its challenged regulations.

These cases graphically demonstrate how the availability of district court jurisdiction enabled the judiciary to fulfill one its most critical functions under our governmental structure; that is, assuring that the executive branch of government adheres to the will of Congress. They demonstrate that it is not reasonable to ascribe to Congress an intention to prohibit the only form of judicial power that could, under the relatively unique circumstances applicable to IRCA, assure that the legalization program, as implemented, would remain within Congressional boundaries.

STATEMENT OF INTEREST OF AMICI

Amicus curiae the FARM LABOR ALLIANCE ("FLA") is a voluntary nonprofit association made up of the major agricultural grower associations in California, Washington and Oregon and organized under the laws of California in 1983. FLA was founded to promote the congressional adoption of a viable agricultural labor program as part of any immigration reform legislation enacted into

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law.[4] FLA took the lead in working with national agricultural groups in supporting the inclusion of the SAW program as part of IRCA.[5] The efficient and expeditious determination of SAW eligibility and resultant work authorization were critical to the establishment of a legal agricultural work force upon the imposition of employer sanctions. To facilitate this end, FLA members established one of the nation's largest Qualified Designated Entities (QDE) to assist farm workers in seeking legalization and, consequently, have firs hand experience with the SAW application procedures at issue in this case.

Although most farm workers providing services to FLA members have sought legalization through the SAW program, many have applied for amnesty under the general legalization provisions of IRCA and also may be affected by a broad decision of this Court denying district court jurisdiction in the LULAC, CSS, Zambrano and Ayuda cases addressed in this brief.

Amicus curiae CATHOLIC SOCIAL SERVICES OF SACRAMENTO, CENTRO DE GUADALUPE IMMIGRATION CENTER (CSS), is a non-profit organization providing, inter alia, social and legal assistance to immigrants seeking legalization under IRCA. CSS is a plaintiff in CSS v. Thornburgh, supra, challenging INS

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4 In creating the SAW program, congress responded to the needs of the perishable agricultural industry for an immediate legalized work force. It created a program with a narrow 18-month window of opportunity for individuals to apply for SAW status. The importance of the right to district court jurisdiction to challenge arbitrary agency actions is underscored by recognizing not only the individual rights at stake but also the disruption such action causes effected industries reliant upon the services of those individuals whose rights are abridged. Disruptions caused by the improper denial of legal status to entire groups of eligible Special Agricultural Worker (SAW) amnesty applicants would be exacerbated by the delay of several years required if these applicants were individually required to seek judicial review through the procedures set forth in INA § 210(e). The economic consequences would likely affect producers, food processors, marketers, transporters, wholesalers, retailers and consumers.

5 Consistent with this concern, the FLA filed an amicus brief in support of plaintiffs-appellees in CSS v. Thornburgh, 664 F.Supp. 1378 (E.D. Cal. 1987), appeals stayed pndg decision in McNary, CA NOS. 88-15046, 88-16127 & 88-15128 (9th Cir. 1990), wherein appellees challenged, among other things, INS's improper imposition of physical presence and residency requirements for applicants of the SAW program.

amnesty regulations. As a result of that litigation, thousands of applications have been reprocessed under lawful standards and tens of thousands of amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal (since modified) INS regulations, have been permitted to file "late" amnesty applications and receive temporary stays of deportation and employment authorization. *See* Ninth Circuit Order, Exhibit 3. A ruling in the instant case which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by CSS class members, would force the INS to **revert** approximately 50,000 *amnesty-eligible* CSS immigrants to illegal status.

Amicus curiae LEAGUE OF UNITED LATIN-AMERICAN CITIZENS (LULAC) is one of the oldest Hispanic membership organization in the United States. Its primary goals include the protection of the legal, political and cultural interests of Hispanic people. LULAC participated as a plaintiff in LULAC v. INS, Civ. No. 87-4757-WDK(JRx) (C.D. Cal.) (slip ops. Exhibit 4-5), appeal stayed pndg decision in McNary, CA NO. 88-6447 (9th Circuit), challenging INS amnesty regulations. As a result of that litigation, tens of thousands of amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal (since modified) INS regulations, have been permitted to file "late" amnesty applications and receive temporary stays of deportation and employment authorization. *See* Stipulated Stay Order, Exhibit 6. A ruling in the instant case which which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by LULAC class members, would force the INS to revert approximately 35,000 *amnesty-eligible* LULAC immigrants to illegal status.

Amicus curiae the AMERICAN IMMIGRATION LAWYERS ASSOCIATION (AILA) is a national organization of practicing lawyers and law school professors who practice and teach in the fields of Immigration and Nationality Law. AILA, its members and its members' clients have a direct and substantial interest in the outcome of this case.

Amicus curiae the AMERICAN G.I. FORUM is one of the largest nationwide Hispanic membership organizations in the United States. Among its primary purposes are the education of its members and advocacy on behalf of members and Hispanic people in the areas of civil and political rights. The American G.I. Forum has members and

assists non-members seeking amnesty under district court orders issued in LULAC and CSS, supra. *The question of whether these applicants will be processed for amnesty or reverted to illegal status may depend on this Court's decision in the instant case.*

Amicus curiae the the MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (MALDEF) is a national non-profit legal advocacy organization working to promote the civil rights of Hispanics in the areas of immigration, education, employment and political rights. MALDEF is a plaintiff in Ayuda v. Thornburgh, 687 F.Supp. 650 (D.D.C. 1988), vacated in part, 880 F.2d 1325 (D.C. Cir. 1989), pet. for cert. pndg., No. 89-1018. As a result of that litigation, thousands of applications have been reprocessed under the correct standards and approximately 6,000 amnesty-eligible immigrants, who were erroneously excluded from participation during the application period under illegal INS regulations, have been permitted to file "late" amnesty applications. A ruling in the instant case which which denies district court jurisdiction in all amnesty-related cases, without the benefit of analysis of the injury suffered by Ayuda class members, would force the INS to revert approximately 6,000 *amnesty-eligible* Ayuda immigrants to illegal status.

Amicus curiae WASHINGTON ASSOCIATION OF CHURCHES ("WAC") is an ecumenical organization of several denominations which has as one of its purposes to assist persons applying for legalization through its statewide legalization project which obtained QDE status. The Washington Association of Churches is a plaintiff in Immigrant Assistance Project (IAP) v. INS, 709 F.Supp. 998, 717 F.Supp. 1444 (E.D. Wash. 1989), appeal stayed pndg decision in McNary., CA Nos. 89-35345, 89-35593 (9th Cir.). The district court in IAP held INS amnesty regulations to be in violation of the amnesty statute and the due process clause of the Fifth Amendment, and ordered INS to reprocess several thousand cases. The reprocessing of these cases has been stayed pending the outcome of INS's appeal in IAP.

Amicus curiae TRAVELERS AND IMMIGRANTS AID OF CHICAGO ("TIA") is a QDE authorized by INS to accept and process legalization applications. It is one of the largest QDE's in Chicago and has provided assistance to thousands of amnesty applicants in the Chicago area. TIA is a plaintiff in IAP. Many of its clients are affected

by the rulings in CSS, LULAC, Ayuda and IAP. *Whether these applicants will be processed in accordance with the amnesty statute or returned to illegal status may depend on the Court's ruling in this case.*

Amicus curiae the AMERICAN FRIENDS SERVICE COMMITTEE (AFSC) is an independent Quaker organization which conducts programs of service, justice and peace through its headquarters in Philadelphia, nine regional offices across the U.S., and program operations in 30 countries abroad. AFSC has assisted numerous immigrants seeking amnesty under IRCA, including applicants whose eligibility may be affected by the manner in which the Court decides the instant case.

Amicus curiae CATHOLIC CHARITIES OF LOS ANGELES, INC., is a multi-service agency with 850 employees and 3,500 volunteers servicing over 290,000 clients per year, many on immigration matters. It has assisted tens of thousands of applicants in the amnesty process, including hundreds benefitted by the district court orders issued in CSS, LULAC, Ayuda and IAP. CATHOLIC CHARITIES is concerned that this Court's ruling in the instant case may affect the legalization rights applicants under the district court orders issued in CSS, LULAC, Ayuda and IAP.

Amicus curiae LEOQUILDO VALLE is a plaintiff in a class action case, Lopez v. Ezell, 716 F.Supp. 443 (S.D. Cal. 1989). He is eligible for SAW status and filed a preliminary application on May 4, 1988 at the Calexico port-of-entry in California. He was issued INS form I-94 authorizing entry into the U.S. for 90 days to complete his application. When he subsequently attempted entry, he was detained and, without a hearing or cause, his I-94 was confiscated. The ruling of this Court in the instant case may affect the relief he and his class members won in Lopez.

Amicus curiae SOFIA BAEZ de HUERTA is a plaintiff in CSS, supra. She is eligible for amnesty. On May 10, 1987 she visited her mother for Mother's Day in Mexico for five hours. As she did not have INS permission to depart the U.S., under the regulation challenged in CSS her brief absence rendered her automatically ineligible for amnesty. The manner in which this Court rules in the instant case may affect the district court relief she and her class members won in CSS.

Amicus curiae ANNA R. is a plaintiff in the class action Zambrano v. INS, No. S-88-455 (E.D. Cal. 1988), appeal stayed pndg

decision in McNary., CA Nos.88-15438, 88-15533 (enjoining INS regulation denying eligibility to applicants if any immediate family ever received "public cash assistance"). She has two U.S. citizen children and is eligible for amnesty. The manner in which this Court rules in the instant case may affect the district court relief she and her class members won in Zambrano.

ARGUMENT

DISTRICT COURTS HAVE PROPERLY ASSUMED JURISDICTION OVER SEVEN CHALLENGES TO INS REGULATIONS WHICH, IN BLANKET FASHION, AUTOMATICALLY BUT ILLEGALLY HELD INELIGIBLE ENTIRE GROUPS OF IMMIGRANTS FROM PARTICIPATION IN THE AMNESTY PROGRAM

If this Court finds that the district courts, across-the-board, lacked jurisdiction to remedy injuries cause by illegal and unconstitutional INS regulations implementing the amnesty statute, then over 100,000 amnesty-eligible applicants will be returned to illegal status, unable to work lawfully and subject to deportation at any time. To do so would be directly contrary to the legislative intent to enact a generous one-time legalization program, allowing "INS to target its [future] enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States." H. Rep. No. 682(1), 99th Cong. 2d Sess. at 49. A "liberal and generous" implementation of the legalization program is "necessary to ensure true resolution of the problem and to ensure that the program will be one time only." Id. at 72.

As we will show, district courts in seven class action cases have assumed jurisdiction over *successful* challenges to blanket INS regulations which automatically and illegally deemed entire classes of applicants ineligible, and, therefore, also ineligible for temporary stays of deportation and employment authorization. There is no doubt but that the procedures set out in INA §§ 210(e) and 245A(f), to obtain judicial review of denials of applications, *would have been unavailable to the vast majority of applicants involved in these seven district court actions.* In each of these cases the effectiveness of district court review cannot be gainsaid -- in virtually every case INS modified its challenged regulations and reprocessed all applicants erroneously denied. It only refused to extend any remedy (and has opposed judicial remedies) for eligible applicants who did not effect a timely "filing" solely because

their applications were erroneously rejected or they were discouraged from filing by (now modified) illegal regulations.[6]

1. United Farm Workers of America v. INS

In United Farm Workers of America (UFW) v. INS, Cv. No. S-87-1064 LKK/JFM (E.D. Cal.), plaintiffs, the UFW and 13 individuals, filed a district court class action primarily challenging policies adopted in INS's adjudication of SAW applications. After obtaining preliminary relief on one of their causes of action,[7] plaintiffs amended their complaint raising several of the same claims in the 25 states and territories in the INS Western and Northern Regions which had been successfully litigated in Haitian Refugee Center v. McNary and implemented in the INS Southern Region without appeal in the instant case.

In 1988, the district court issued an order which, while denying plaintiffs' motion for preliminary relief, agreed with plaintiffs'

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6 Amici believe that a "case or controversy" remains in CSS, Ayuda, LULAC, Zambrano, Lopez and IAP. In the first four, it only remains because INS has refused to acquiesce in court orders allowing "late" filings of amnesty applications (even in these cases INS has acquiesced in the merits of the district court decisions as to class members who filed timely). In IAP no extension was ordered, but INS is holding "in abeyance" the processing of applications while appealing portions of the merits of the district court orders. In Lopez, a partial settlement has been stipulated to and ordered, but some issues remain to be litigated. In contrast, as argued in respondents' opposition to petition for writ of certiorari, the lower court's orders in this case "have largely been completed." Bf for the Respondents in Opposition at 26. To the extent they have not, no case or controversy is presented since INS has agreed to (and is) conducting re-interviews for whatever additional class members might be identified in the future.

7 Plaintiffs obtained a preliminary injunction requiring the INS to comply with the SAW statute which required the agency to promulgate regulations authorizing the issuance of subpoenas for the timely production of farmworker amnesty applicants' employment records. UFW v. INS, No. Cv. S-1064 LKK (E.D. Cal. May 13, 1988). INS had not issued such a regulation making it impossible for many farmworkers to establish their eligibility. INS, in compliance with the preliminary injunction, eventually promulgated a regulation two months after the close of the application period. 8 C.F.R. § 210.3(b)(4), 54 Fed. Reg. 4756 (Jan. 31, 1989). This order was not appealed by the INS.

interpretation of the law on two issues. First, the court held that (1) INS was required "to enunciate specific reasons why a SAW application has been denied,"[8], and (2) the district court articulated the standard of proof (id. at 18-19) later incorporated into a district court approved class certification and settlement. The settlement provided the relief sought by plaintiffs in three of five claims, one being the claim, also raised in the present case, that INS policy misapplied the "just and reasonable inference" standard on the burden of proof applied in adjudicating applications.[9] The parties stipulated to a class of all SAW applicants in the Western and Northern Regions whose applications had been rejected, denied, or not finally processed by the regional INS offices. Settlement at § I, rep'd in 66 INTERP. REL. 464 et seq. (Apr.24, 1989).

According to INS reports submitted to plaintiffs' counsel pursuant to the settlement, id. at ¶ V(f), approximately 17,000 class members' applications meeting certain threshold requirements have been reviewed under the terms of the settlement and thousands of class members were granted employment authorization and stays of deportation pending review.

Recognizing the scope and significance of the judicial review limitations contained in INA §§ 210(e) and 245A(f), the parties in UFW stipulated that "[n]othing in this settlement shall be construed as permitting a district court to make individual determinations on individual applications." Id. at ¶ V(b).

After the settlement was conditionally approved by the district court in April 1989, INS issued a nationwide cable to its field offices which stated:

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8 "[P]laintiffs have correctly articulated the extent of INS's obligations in this regard." UFW v. INS, No. S-87-1064 LKK (E.D. Cal.) (Memorandum Order of Nov. 17, 1988, at 7-8).

9 The "just and reasonable inference" standard is set forth in INA § 210(b)(3)(B)(iii). Under the settlement, SAW applicants could meet their burden of proof by submitting some credible documentation along with their own personal testimony verifying that they worked the requisite number of days to meet SAW eligibility. The settlement is consistent with the legislative history. H. Rpt. No. 99-1000(I), cited in U.S. Code Cong. & Admin. News at 5840, 5843.

> Although the court decision [in UFW v. INS] directly affects only the Northern and Western Regions, the standards on burden of proof, specificity of denial notices and adverse evidence [the three claims incorporated in the settlement] apply to SAW applications nationwide and should be reviewed by all persons adjudication SAW applications.

Cable of May 2, 1989 (CO-1588-C), rep'd in 66 INTERP. REL. 573-74 at 574 (May 22, 1989).

District court review in UFW, just as in the instant case, was the only rational manner in which thousands of eligible applicants could obtain the important statutory benefit granted by Congress. Once it was recognized that they were not ineligible, their applications were processed (or reprocessed if previously denied), they were issued temporary stays of deportation and employment authorization, and in every way were "on track" emerging from illegal status precisely as intended by Congress.

Under the approach argued by the INS in the instant case, ironically after granting relief to class members just as it did pursuant to settlement in UFW, (1) tens of thousands of applicants would have been erroneously denied, (2) applicants statutorily eligible to regularize status would have been erroneously denied temporary stays of deportation and employment authorization, (3) these applicants would eventually have had to be arrested, (4) discretion exercised by INS to initiate deportation hearings in their cases, (5) Immigration Judges throughout the country would have had to conduct tens of thousands of useless deportation hearings (lacking jurisdiction over review of the erroneous denials of legalization),[10] (6) the Board of Immigration Appeals would have had to review tens of thousands of cases (lacking jurisdiction over review of the erroneous denials),[11] and (7) the Courts of Appeals would then have

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10 *See* 8 C.F.R. § 103.3(a)(2)(iii) ("No further administrative appeal shall lie from [the amnesty] decision, nor may the [amnesty] application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings."). See also Ayuda v. Thornburgh, supra, 880 F.2d at 1332 n. 7 ("Facial challenges to the regulation [in a proceeding before the LAU] are not permitted"); Matter of Fede, Interim Dec. 3106 at 2-3 (BIA 1989) ("A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges . . .").

11 See footnote 8, supra.

been required to review thousands of petitions for review. INS, as is its practice, would not necessarily follow one Circuit's decision when operating in other circuits, and circuits might disagree, prompting Supreme Court review. Aside from the fact that this approach requires tens of thousands of useless arrests, administrative hearings and review, at an obviously enormous cost to the INS, it also delays indefinitely the eligible applicants' grant of statutorily mandated temporary stays of deportation and employment authorization. Congress intended the very opposite -- an efficient and quickly resolved amnesty program. S.Rep. No. 132, 99th Cong., 1st Sess. 48 (1985).

2. Lopez v. Davidian[12]

Plaintiffs in this district court case are, inter alia, "preliminary" SAW applicants,[13] who were subsequently detained by Border Patrol agents and had their application documents improperly confiscated. A consent order was stipulated to by the INS and plaintiffs resolving most of the substantive issues raised in plaintiffs' complaint. Lopez v. Ezell, 716 F.Supp. 443, 444 (S.D. Cal. 1989); Consent Order (CV. No. 1825 JLI) (May 1, 1989) at ¶ 2 (Exhibit 7).

The consent order certified a class of would-be SAWs whose travel and work documents were confiscated at ports of entry or checkpoints in the Western and Southern Regions before their applications had been finally adjudicated. Id. The consent order allows preliminary applicants additional time to complete their applications and file the supporting documentation. Id. at ¶ 6. Pending adjudication of their individual applications, Lopez class members are being issued replacement documents and temporary employment authorization by the INS.

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12 This case was filed as Lopez v. Ezell. INS Regional Commissioner Davidian was substituted for Ezell when he replaced Mr. Ezell in office.

13 Preliminary applications were filed by persons at designated ports of entry to allow expedited processing for those who were outside the country when the SAW application period commenced. These applicants were admitted for 90 days to allow them to work and collect sufficient documentation to complete their applications. See 8 C.F.R. § 210.2(c)(4). They were provided an INS form "I-94" evidencing their status in the U.S., work authorization and stays of deportation.

Again, as in UFW and the instant case, district court review was the only effective vehicle to remedy the challenged (later modified) INS policy. There was no other judicial procedure to remedy the impact of INS's policy on class members' statutory right to immediate temporary stays of deportation and employment authorization. As in several of the cases discussed infra, class members had not received final "denials" making judicial review under INA § 210(e) impossible. In fact, the INS agreed that disputes over the consent order could be reviewed by the district court. Exhibit 7, at ¶ 10.

3. Catholic Social Services v. Thornburgh

In CSS, plaintiffs challenged INS regulations and policies which (1) made ineligible for legalization all applicants who travelled outside the U.S. during the application period *without prior INS permission*, and (2) denied employment authorization to eligible applicants apprehended by INS prior to the enactment of IRCA or who, after enactment, surrendered to the agency. The statute specifically authorized "brief, casual and innocent absences" during the application period, INA § 245A(a)(3), 8 U.S.C. § 1255a(a)(3), and also mandated temporary employment authorization to all persons prima facie eligible for legalization. INA §§ 210(f) and 245A(e).

The first national legalization instruction (INS Legalization Wire #1), explicitly stated that Catholic Social Services class members who briefly travelled after IRCA's enactment without prior INS permission were statutorily "ineligible . . . [and] are to be processed for deportation." Clerk's Record 47 (in CSS), Pl. Ex. A p. 2.[14] After INS published its final legalization regulations on May 1, 1987,[15] it issued a further telex instruction to all its employees: "[a]ny alien whose last

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14 References in this section of the brief to the Clerk's Record ("C.R."), followed by the appropriate docket entry and a page or paragraph citation, are to the Clerk's Record on file with the Ninth Circuit Court of Appeals in CSS v. INS.

15 INS's position that class members were statutorily ineligible for legalization was formalized in the agency's final regulations, 8 C.F.R. section 245a.1(g). Enforcement of this regulation was enjoined by the district court just days before expiration of the 12-month application period; defendants have not appealed that final injunction.

entry was after May 1, 1987 [i.e. class members in this case] will be considered ineligible to apply for legalization."[16]

The INS Legalization Manual, used by INS employees and non-profits ("Qualified Designated Agencies") that contracted with the INS to process legalization applicants provides: "[I]f the applicant . . . is statutorily ineligible, the application will be rejected . . ." Exhibit 8 (emphasis added).

Instead of being granted employment authorization and a stay of deportation, class members were often placed in deportation proceedings or expelled from the country. For example, class member Juan Anselmo Torres-Rivas, who was eligible for legalization, was deemed ineligible because of an absence after the enactment of IRCA and therefore "was taken to the U.S. Border patrol station in Laredo, Texas, made to sign a form, and on the same day I was taken to the International Bridge, and told to leave the United States. The INS then made me walk across the bridge into . . . Mexico."[17]

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16 CR 148, Pl. Ex. NNNN (Wire #14) at 4 (emphasis added). Farmworker legalization applicants who travelled without INS advance parole were accorded the same treatment: "The screening process that occurs upon receipt of the application should include a quick review of the applicant's entry date. If the entry date is after June 26, 1987, the application should be rejected," that is, not even permitted to be filed. CR 115 Pl. Ex. BBB (emphasis added). Consistent with written policy, these applications were "automatically reject[ed] . . ." CR 145, Pl. Ex. CCCC, para. 3.

17 CR 148, Pl. Ex. KKKK, para. 7 (emphasis added). Class member Maria Noriega, who qualified for legalization, was apprehended by the INS in Phoenix, Arizona. CR 148, Pl. Ex. JJJJ, para. 5. She had briefly travelled without INS advance parole and was therefore (the agency now concedes improperly) considered ineligible by the INS. Id. Instead of being offered an opportunity to apply for legalization, she was "told she was not eligible for legalization due to her reentry . . . After having been advised by the [INS] officials that she was not eligible for legalization and that she would be held in jail on a high bond, Mrs. Noriega signed a form I-274 requesting a voluntary return to Mexico." Id. para. 6. Because there was "a great lack of consistency among different Legalization offices," CR 133, Pl. Ex. XXX, some class members actually proferred and had accepted timely applications. These applications were routinely denied by the INS. *See, e.g.*, CR 145, Pl. Ex. DDDD, para. 13, Exhibit FFFF, para. 11. INS has now agreed to reprocess all timely filed applications in a manner consistent with the district court's summary judgment and remedial orders.

On March 23, 1987, the parties reached a nation-wide settlement pursuant to which the INS agreed to grant temporary employment authorization to persons prima facie eligible for legalization who were apprehended by the INS prior to the enactment of IRCA, and those who voluntarily surrendered to the INS. Stipulation of Partial Settlement in Class Action, Exhibit 9, p. 2 of the Notice attached to the Stipulation.

On June 17, 1987, the district court issued a preliminary injunction enjoining INS's exclusion and deportation of SAW workers who briefly, but without prior INS permission, departed the country after the enactment of IRCA. CSS v. Meese, 664 F.Supp. 1378 (E.D. Cal. 1987). INS took no appeal from that decision.

On May 3, 1988, the District Court granted plaintiffs' motion for summary judgment explaining that INS's "final regulation [requiring that all post-enactment absences be authorized by the agency]. . . is invalid as inconsistent with the statutory scheme and hence is unenforceable." Exhibit 10 [18] On June 10, 1988, the District Court entered an Order granting relief to class members. Exhibit 11.

INS did not appeal the merits of the district court's summary judgment decision -- in fact, *the INS subsequently modified its regulation and reprocessed the applications of all class members who had timely filed.* INS's appeal to the Ninth Circuit is limited to the jurisdiction of the District Court and its authority to grant equitable relief to class members who failed to file timely applications solely because of INS's illegal regulation.

For the majority of CSS class members there would never have been judicial review had the district court not assumed jurisdiction. The vast majority of CSS class members protected from deportation by the court's order would never have been able to appeal "denial[s]" of their applications through the procedures set forth in INS § 245A(f), as they never received "denial[s]." *Because of INS's illegal regulation, approximately 50,000 never even got applications on file.*[19]

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18 On the same date the District Court issued an Order amending the class definition to include all prima facie eligible applicants who departed the U.S. after the enactment of IRCA for reasons that were brief, casual and innocent but without the prior permission of the INS as required by its illegal regulation.

19 Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the

District court jurisdiction was also appropriate given that CSS class members had no protection from arrest and deportation because INS *deemed them ineligible* for amnesty and therefore equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. INA §§ 210(d) & 245A(e), 8 U.S.C. §§ 1160(d) & 1255a(e).

4. LULAC v. INS

LULAC v. INS, NO. 88-6447 (9th Cir.) involves a challenge to INS's blanket, non-individualized policy of automatically deeming ineligible for legalization immigrants who briefly departed the United States during the required period of continuous unlawful residence (commencing January 1, 1982), and returned to unrelinquished, unlawful residences in the U.S. using non-immigrant visas or other INS documentation.[20] Memorandum Decision and Order, Exhibit 4. Under INS's regulation, only those aliens who returned from brief trips clandestinely evading INS inspection, were deemed not to have broken their unlawful residence in the United States. This policy clearly violated the eligibility criteria as mandated by Congress -- it virtually eliminated European, Asian, South American and African applicants from eligibility in the legalization program. The legalization program was effectively limited to nationals from Mexico and Central America -- those who traditionally leave and return clandestinely without inspection.

In July 1987, three months into the 12-month application period, six individual amnesty applicants and ten community and legal services organizations involved in assisting amnesty applicants filed the LULAC suit challenging INS's regulation.

INS defended its policy, arguing that the statutory requirement of continuous "unlawful" residence was not met when an alien unlawfully residing in the United States briefly travelled outside the country and returned unlawfully using a visa or INS documentation. INS incredibly asserted that the illegal alien's return, unlawfully using documentation, was "constructively" lawful (since documentation was

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time of the determination on the application . . ." CSS plaintiffs and class members never received a "determination on the application . . ." Nor is there an "administrative record" in their cases.

20 8 C.F.R. § 245a (May 1, 1987).

used), and therefore broke the alien's required "unlawful" residence in the country. Exhibit 4, at 2.[21]

This illegal policy was vigorously defended and adhered to for approximately seven months of the 12-month application period. Class members were considered "statutorily ineligible," discouraged from filing applications, and INS legalization officers were instructed to--and did--reject their applications without permitting a formal filing. See Exhibit 8.

After opposing appellees' motion for summary judgment, and filing a motion to dismiss, the INS finally relented and rescinded the challenged policy.[22] However, by the time the policy was rescinded,[23] the statutorily mandated educational outreach program which INS conducted for tens of thousands of potential applicants and community groups had long been completed.[24] The declaration of Catholic Charities of Los Angeles is typical:

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21 INS's bizarre regulation ran directly counter to an unbroken line of cases in which the Attorney General, the INS, the Board of Immigration Appeals, and the courts had held that an entry accomplished with a visa or other INS documentation is unlawful when the alien made material misrepresentations in the visa application or at the time of his/her request for admission to the country. See, e.g., Brownell v. Carija, 254 F.2d 78, 80 (D.C. Cir. 1957); Matter of I.L., 7 I&N Dec. 233 (BIA 1956); Matter of Martinez-Lopez, 10 I&N Dec. 409 (Atty Gen. 1964).

22 The policy was not formally reversed until seven months into the 12-month application period. INS memoranda released in response to plaintiffs' discovery requests indicate that the policy was rescinded, inter alia, "to alleviate the situation created by the [LULAC] lawsuit," C.R. 29 at 158, and "may overcome [this] pending litigation." Id. at 159. References in this section of the brief to the Clerk's Record ("C.R."), followed by the appropriate docket entry and a page or paragraph citation, are to the Clerk's Record on file with the Ninth Circuit Court of Appeals in LULAC v. INS.

23 8 C.F.R. section 245a.2(b)(9), (10), reprinted in, 52 Federal Register 43843 (Nov. 17, 1987).

24 INA § 201(i) provides that "the Attorney General, in cooperation with qualified designated entities, shall broadly disseminate information respecting the benefits which aliens may receive under this section and the requirements to obtain such benefits." Under this section INS "broadly disseminated" information regarding its illegal regulation.

> Until November 17, 1987, it was the formal policy of the INS to deem ineligible for legalization any alien who had after January 1, 1982 briefly departed the United States and returned improperly using a non-immigrant visa. Consistent with its final regulations, the INS advised QDEs . . . that potential applicants who briefly departed the United States after January 1, 1982 and returned improperly using non-immigrant visas were ineligible for legalization. QDEs . . . recommended to many applicants that they not file legalization applications because they were deemed statutorily ineligible by the INS . . .
>
> The majority of applicants are basically unfamiliar with their rights under the IRCA and have heavily relied upon information disseminated . . . by the INS, or information provided by QDEs . . . Most applicants speak Spanish or Asian languages rather than English, and the majority of applicants have little formal education. The vast majority of publicity regarding INS' eligibility criteria was issued in May 1987, when the policy was to deny legalization to the proposed class members . . . Very little publicity was generated regarding INS change in policy, formalized on November 17, 1987 . . .[T]housands of people failed to learn about the change in policy, and, therefore, did not file applications by May 4, 1988.

CR 78, Exhibit 9, ¶¶ 5-6 (emphasis added).

On July 15, 1988, the district court granted partial summary judgment in favor of appellees. Exhibit 4. The court pointed out that "IRCA expressly permits an alien to leave the United States for brief periods of time." Id. at 8, citing 8 U.S.C. § 1255a(g)(2)(A). The court concluded that the challenged regulation "conflicts with the plain meaning of the statutory scheme." Id. at 12.[25]

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25 The district court also analyzed the legislative history of the legalization statutes and concluded that defendants' "reentry" policy was "inconsistent with Congress' intent when it enacted IRCA." Id. at 15.

The district court, on August 12, 1988, ordered the INS to accept and process applications filed by class members through November 30, 1988. Exhibit 5; C.R. 70.[26]

INS filed a notice of appeal, not on the merits, but solely challenging the jurisdiction of the district court and its authority to grant equitable relief to class members. A stipulated stay was entered which currently *allows LULAC class members to file applications with the INS and receive temporary stays of deportation and employment authorization cards*. Exhibit 6. Approximately 35,000 applications have been filed under the stipulated stay order.[27] Further consideration of LULAC has been stayed by the Ninth Circuit pending decision in the instant case.

For the LULAC class members there would never have been judicial review had the district court not assumed jurisdiction. The LULAC plaintiffs and class members protected from deportation by the court's order would never have been able to appeal "denial[s]" of their applications through the procedures set forth in 8 U.S.C. § 1255a(f), as they never received "denial[s]." *Because of INS's illegal regulation, coupled with the agency's policy, as set forth in its Legalization Manual, of rejecting applications from persons deemed "statutorily ineligible," tens of thousands of LULAC class members never even got applications on file.*[28]

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26 The district court enjoined INS from "refusing to accept" applications filed by class members through November 30, 1988. Id. at 9. The court further ordered INS to prepare "appropriate procedures to determine whether an applicant claiming to fall within subclass one indeed legitimately does." Id. The court enjoined INS from deporting subclass one members until they had "adequate time to apply for legalization." Id. at 10.

27 Given their unique circumstances, whether these class members and their families will be permitted to continue their lawful, above-ground lives, now documented by the INS, or must return to their previous illegal, underground lives, should not be determined by this Court's disposition in the instant case.

28 Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the time of the determination on the application . . ." LULAC plaintiffs and class members never received a "determination on the application . . ." There is no "administrative record" in their cases.

District court jurisdiction was also appropriate given that LULAC class members had no protection from arrest and deportation because INS *deemed them ineligible* for amnesty and therefore equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. 8 U.S.C. § 1255a(e)(2).

The notion that Congress intended the approximately 200,000 LULAC class members, including 35,000 who did not effect timely filings, to wait to be apprehended, placed in thousands of deportation hearings, found deportable, file over 100,000 appeals to the BIA, and finally file tens of thousands of petitions for review in the Courts of Appeals (all while not being authorized to work) in order to obtain judicial review of the legality of one INS regulation is preposterous. Congress could not possibly have intended such a chaotic, confusing and costly mechanism to review the legality of one INS regulation. In any event, INS has never explained how the 35,000 LULAC class members who did not file timely applications solely because of INS's illegal regulation could avail themselves of the appellate review procedures described in Section 1255a(f) since they never received "denial[s]" which could be reviewed in the Courts of Appeals.

5. Ayuda v. Thornburgh

On March 8, 1988, four non-profit organizations providing assistance to amnesty applicants and five individuals filed suit in the district court for the district of Columbia challenging a blanket INS policy, which deemed ineligible for amnesty, applicants unless their illegal status was known to the INS prior to January 1, 1982. Ayuda v. Thornburgh, 907 F.Supp. 998 (D.D.C. 1988). The relevant statute, 8 U.S.C. § 1255a(a)(2)(B), required only that an applicant's illegal status must have been "known to the Government" prior to January 1, 1982.[29]

By Order dated March 30, 1988, District Judge Stanley Sporkin ruled that Section 1255a(a)(2)(B) was "crystal clear" and "[t]hroughout the text of IRCA, Congress exhibits its ability to differentiate between

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29 The challenged regulation required not only that the applicant's illegal status was "known to the INS," rather than "to the Government," but also that the information "known to the INS" was "stored or otherwise recorded in the official Service alien file." 8 C.F.R. § 245a.1(d)(May 1, 1987).

the 'INS' and the 'Government." Id. at 661. The court continued that "IRCA is plainly not a statute where Congress used the term 'Government' to refer to the agency [INS] charged with administering the Act." Id. at 661-62.

The district court further ruled that it possessed jurisdiction because, inter alia, "[n]o administrative remedy exists for [the] organizational plaintiffs to resolve the conflict between . . . the plain meaning of the statute on the one hand and the INS' narrow interpretation of the 'known to the Government' requirement on the other." Id. at 660. The district court also carefully analyzed the standing of the organizational and individual plaintiffs. As to the organizational plaintiffs, the district court concluded that because of INS's illegal regulation, the "plaintiff-organizations are handicapped in their ability to perform their core function -- immigration counselling." Id. at 656. The court further determined that the INS's illegal regulation made "immigration counseling tasks much more complex, burdensome and time consuming . . . [and] [t]he organization[-plaintiffs'] resources are being needlessly squandered because of the INS' regulation." Id.[30]

The district court enjoined INS from continuing to apply its illegal regulation, and further ordered INS to "take steps to notify promptly all persons affected by the regulation in question of this court's determination." Id at 666. The INS acquiesced in the Court's interpretation of the statute and did not appeal its Order. *See* Ayuda, Inc.v. Thornburgh, 880 F.2d 1325 (D.C. Cir. 1989).

Subsequently, on April 7, 1988, the district court issued Supplemental Order II, requiring the INS to reopen the cases of any applications for legalization applications improperly denied under INS's illegal regulation. Ayuda, Inc. v. Meese, 687 F.Supp. at 667. INS

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30 The district court recognized that the illegal regulation placed the Qualified Designated Entities (QDEs) in an "intolerable and conflicting position." Id. at 657. Under contract with the INS, the QDEs were authorized under IRCA to accept fees for amnesty applications (average fee $200). Id. INS's contract with the QDEs "requires the staff of QDEs to comply with all INS regulations relating to the legalization program." Id. Thus, QDEs, including some of the Ayuda organizational plaintiffs, were forced to counsel eligible applicants that they were ineligible under INS's illegal regulation and could not, consistent with their INS contracts, accept and process applications proferred by eligible class members.

likewise acquiesced in this ruling and did not appeal. *Those cases have now been reopened and reprocessed.*

On May 2, 1988, two days before the filing deadline, the district court entered Supplemental Order V, which enjoined INS from denying legalization to applicants who violated their status prior to January 1, 1982 by failing to comply with the mandatory quarterly or annual registration requirements of former INA § 265. Id. at 668. Portions of this Order were appealed and, in a 2-1 decision, the D.C. Circuit vacated the district court's Order on the ground that the judicial review provisions of 8 U.S.C. § 1255a(f) precluded district court review. Ayuda v. Thornburgh, supra, 880 F.2d 1325.[31] Plaintiffs' petition for rehearing en banc was denied by an Order in which four separate opinions issued.[32] Plaintiffs thereafter filed a petition for a writ of certiorari before this Court, No. 89-1018, which petition is still pending.[33]

In the district court, plaintiffs also established that a large number of amnesty-eligible immigrants were not informed of the district court's Order of March 30, 1988 in the one month left between the date of its issuance and the end of the application period. Therefore, the district court, on June 9, 1988, issued Supplemental Order IX, allowing putative class members whose applications were rejected for filing, or who were discouraged from filing by INS's illegal regulation, to file

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31 Chief Judge Wald filed a dissent in which she stated that the judicial review provisions of IRCA did not preclude the District Court's exercise of federal question jurisdiction under 28 U.S.C. § 1331, and 8 U.S.C. § 1329 to invalidate INS legalization rules. Id. at 1366.

32 Four of the nine active judges voted to rehear the case en banc. Ayuda, Inc. v. Thornburgh, No. 88-5226 (D.C. Cir. Oct. 4, 1989) (order denying rehearing en banc). In addition, however, Circuit Judge Buckley stated that he was inclined to agree with the dissent's analysis of the jurisdictional issue but due to his own views on the other issues in the case, he concurred in the denial of rehearing, because to do otherwise would "raise false hopes among the appellees while denying them the opportunity for prompt review by the Supreme Court." Id., (Opinion of Buckley, J.).

33 The petition for certiorari was filed in December 1989. The INS, in its response, requested that a decision on the petition be stayed pending disposition of the instant case. Brief for Respondents at 23. No further action by this Court has been taken.

applications through August 1988. Ayuda, Inc. v. Meese, 687 F.Supp. at 671. Approximately 6,000 amnesty-eligible applicants have filed applications under Ayuda.

6. Immigrant Assistance Project v. INS

In Immigrant Assistance Project v. INS, supra, the plaintiffs, including the Washington Association of Churches and several QDEs and individual amnesty applicants, filed suit in the district court on behalf of three separate categories of individuals applying for legalization. On March 6, 1989 district court Chief Judge Barbara Rothstein granted summary judgment in favor of the plaintiffs on virtually all substantive issues affecting the three categories of legalization applicants. Immigrant Assistance Project v. INS, 709 F.Supp 998 (W.D. Wash. 1989).[34]

Category 1 includes applicants whose illegal status was "known to the Government" prior to January 1, 1982, as required by the amnesty statute, because they failed to register their addresses with the INS on a quarterly basis as required INA § 265, 8 U.S.C. § 1305; see also 8 C.F.R. § 265.1 (1973).[35] The district court ordered INS to process these several thousand applications which the INS was holding "in abeyance" within ninty days, or alternatively to notify the applicants of the court's orders and of the need to remain in contact with the INS. 717 F.Supp. at 1448.[36]

Category 2 includes applicants originally admitted to the U.S. on non-immigrant H (temporary workers), L (intra-company transferees) or F (students on duration of status) visas. These applicants, unlike identically situated applicants who entered the U.S. on other non-immigrant visas, were required to meet impossible standards

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34 On June 6, 1989 the court granted in part plaintiffs' request for a supplementary order. Immigrant Assistance Project v. INS, 717 F.Supp 1444 (W.D. Wash. 1989).

35 The district court held that willful violations of § 265 were not merely technical, but rather "made an alien's status unlawful and therefore made [the alien] eligible for legalization under the 'known to the government' standard." 709 F.Supp at 1001.

36 The district court subsequently stayed its orders pending the outcome of INS's appeal to the Ninth Circuit.

of proof (including the production of documents INS had destroyed) to establish that their unlawful status was "known to the Government" prior to January 1, 1982. 709 F.Supp 1002. The district court concluded "congress in IRCA made no similar distinction among types of visas . . . INS has created an irrational distinction among legalization applicants . . . [which] violates the equal protection guarantee." 709 F.Supp.1002-3. The district court granted prospective relief to Category 2 applicants, requiring INS to process their applications in a manner consistent with IRCA and Fifth Amendment due process. Id.

Category 3 applicants consists of aliens who, "by misrepresentation or mistake, [were] incorrectly reinstated to lawful status sometime after January 1, 1982." 709 F.Supp. at 1003. INS argued that despite the fact that the reinstatement was accomplished by fraud or misrepresentation, such reinstatement broke the alien's "unlawful" residence. Id. The district court disagreed, holding that the granting of an immigration benefit through fraud or misrepresentation did not break the alien's unlawful residence.[37] In Matter of N, Int. Dec. 3080 (Commr, Sept. 26, 1988), long after thousands of Category 3 applications had already been rejected or denied, the INS finally ruled in favor of an applicant in Category 3. INS agreed only "that this ruling serves as precedent for future [agency] decisions . . ." Id. (emphasis added). However, Matter of N "does nothing for those applicants previously [rejected or] denied." 709 F.Supp. at 1003. The district court therefore found justification for "requiring the INS to reopen category 3 cases denied prior to Matter of N." Id.

INS argued in IAP that the district court was without jurisdiction under 8 U.S.C. § 1255a(f)(4)(A). Order Denying in Part and Granting in Part Defendants' Motion to Dismiss (Nov. 3, 1988) (Exhibit 12, p. 10). The district court pointed out that "[p]laintiffs here challenge the policies and practices of the INS, namely the refusal of the INS to grant legalization [and temporary stays of deportation and employment authorization] to those applicants who violated the reporting provisions

37 The record indicates that as many as several thousand people fall into Category 3. See Clerk's Record on file with the Ninth Circuit in IAP, CR 88, D76:11-25. These applicants have been advised by the INS that they are ineligible. Id., D78:22-23. See also id., G94:10-20, G95:6-23; E81, ¶¶ 12-13 (recommended denials); E80, ¶¶ 10 and 14 and G96 (denials); I114, ¶¶ 5-6; K144 ¶ 6.

of 8 C.F.R. § 265.1 (1973), violated the terms of their nonimmigrant visas but have no proof other than nonexistant INS files, or received an unlawful change in status from the INS . . ." Id., p. 11. The district court also concluded the case was ripe for adjudication: "Given the expiration of the May 4th deadline, the INS's policies and regulations governing legalization applications are presumably final and therefore fit for judicial determination . . . Denial of judicial review would as a practical matter, completely foreclose any opportunity to present plaintiffs' claims." Id., p. 12 (emphasis added).

The district court also held that the plaintiff organizations possessed standing. Id., p. 13. The plaintiff organizations "counsel and assist aliens to obtain the benefits of legalization . . . , the INS's policies and administration of the amnesty program have perceptibly impaired these organizational goals as well as drained the plaintiff organizations' resources . . . [and the plaintiff] organizations fall within the zone of interests protected by IRCA." Id.; Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Clarke v. Securities Industry Ass'n., __ U.S. __, 107 S.Ct. 750, 757 (1987) (footnote omitted).

By ruling as it did the district court avoided thousands of Category 1-3 applicants being forced to get themselves arrested, placed in deportation proceedings, suffer orders of deportation, file thousands of appeals to the BIA and finally thousands of petitions for review in the Courts of Appeals before obtaining a resolution regarding the legality of INS's national regulations. The plaintiffs in IAP did not seek a district court order reversing INS's denials of amnesty and ordering them eligible for amnesty. Instead, they challenged broad agency policies which automatically deemed them ineligible and, inter alia, resulted in erroneous denials of statutorily mandated temporary stays of deportation and employment authorization. As the district court stated after being fully advised of the claims made, "[d]enial of judicial review [by the district court] would as a practical matter, completely foreclose any opportunity" for judicial review of plaintiffs' claims." Id., p. 12.

7. Zambrano v. INS

In this class action lawsuit plaintiffs challenged INS regulations which automatically (and erroneously) deemed ineligible for legalization any applicant whose immediate family members had ever received

"public cash assistance."[38] As the district court later found, without INS appeal, the agency's regulations violated INA § 245A(d)(2)(B)(iii), 8 U.S.C. § 1255a(d)(2)(B)(iii). INS applied its illegal regulation during the 12-month application period. Thousands of eligible immigrants had their applications rejected under INS's Legalization Manual (Exhibit 8) or were discouraged from filing timely applications by INS's illegal regulation.

By memorandum opinion filed August 9, 1988 and an implementing order filed September 20, 1988, the district court entered a preliminary injunction restraining the INS from applying these illegal regulations to pending legalization applications. The court also required the INS to reprocess cases under the appropriate standard. INS did not appeal the merits of the district court orders, nor its provisional class certification. INS's appeal was limited to the jurisdiction of the district court and one portion of the court's implementing order requiring the INS to disclose the names of class members to class counsel. *Following entry of the district court's orders, INS amended the challenged regulations.*

The district court thereafter granted plaintiffs' motion for summary judgment. Order Granting Plaintiffs' Motions for Partial Summary Judgment, Permanent Injunction and Redefinition of Class (July 31, 1989). Aside from the jurisdictional argument, INS raised no opposition to the legal issue presented in plaintiffs' motion for partial summary judgment. While by this time INS had issued amended regulations, the district court held that the case was not moot, inter alia, because "the amendments do not address at all class two members who failed to timely apply in reliance on the challenged regulations." Id. at 7. The court concluded that the challenged regulations, "both facially, and as interpreted by the INS, are inconsistent with the statute." Id.

Part of the relief granted, and agreed to by the INS, involved reviewing thousands of cases in which INS had improperly required Zambrano class members to file unnecessary "waivers of excludability" and accompanying fees. Id. at 11. This type of relief--reimbursement of improperly obtained fees--could not effectively be raised in judicial proceedings to review "denials" of amnesty applications under INA §§

38 8 C.F.R. §§ 245a.1(i), 245a.2(d)(4) & 245a.2(k).

INA §§ 210(e) and 245A(f). In fact, the illegal fees were demanded whether or not the application was subsequently denied.

The district court also granted a five month extension (through December 31, 1989) of the application period for class members who "would have filed timely applications but for reliance on the invalid regulations." Id. at 15. These eligible applicants, like those in LULAC, CSS and Ayuda, could not appeal "denials" of their applications under INA §§ 210(e) and 245A(f), as they never received denials.

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CONCLUSION

As amici have shown, in several cases district courts have assumed jurisdiction under over challenges to illegal INS regulations which automatically deemed broad groups of eligible immigrants ineligible for amnesty. Neither the legislative history nor the language of the amnesty statute indicate that Congress intended to strip the federal courts of their federal question jurisdiction, 28 U.S.C. § 1331(a), or jurisdiction over "all cases arising under any of the provisions of this subchapter," 8 U.S.C. § 1329, in cases such as these involving broad statutory and Constitutional challenges to INS's rule-making.

It is supremely ironic that while INS argues before this Court that district court review of these cases would cause confusion, conflicting decisions and delays in resolution of broad policy questions, in truth and fact, in virtually every case, including the instant case before the Court, INS amended its challenged regulations and policies after district courts ordered it to do so, avoiding tens of thousands of administrative appeals which would have taken several years to resolve and allowing tens of thousands of eligible applicants to receive the stays of deportation and employment authorization mandated by Congress.[39] In every district court action, other than IAP, INS has now reprocessed or is now reprocessing applications under the proper standards.

Whatever may be argued in theory, there can be no doubt but that in practice the manner in which these cases were handled by the district courts--and the INS in response to court orders--is perfectly consistent with the efficient and expeditious manner in which Congress intended the amnesty program to function. *See* H. Rep. No. 99-682(I), 99th Cong., 2nd Sess., p. 49, reprinted in 1986 U.S. Code Cong. & Ad. News, p. 5653. Congress' primary purpose in enacting the judicial review provisions of IRCA was to avoid delays and uncertainty in the amnesty program. The Senate Report states:

> The Committee is concerned that efforts will be made, on behalf of many persons who are ineligible for the legalization program, to delay the final determinations of their applications. This would prevent not only their own deportation but the expeditious operation of the program . . .
>
> It is for the purpose of helping to insure reasonably prompt final determinations that subsection (f) [is enacted] . . .

S.Rep. No. 132, 99th Cong., 1st Sess. 48 (1985) (emphasis supplied). District court review in these cases allowed for "expeditious operation of the program" and insured "reasonably prompt final determinations" in the case of all applications timely filed by persons who are eligible for the legalization program.

The primary case or controversy which remains at this time involves the fate of approximately 100,000 class members in Ayuda, CSS, LULAC and Zambrano who, at least, pursuant to federal court orders, are no longer part of the illegal, clandestine immigrant population Congress intended to eliminate through IRCA.

For the foregoing reasons, amici urge this Court to affirm the decision of the Eleventh Circuit in this case. In the event the Court reverses the judgments below, amici urge that it not do so in a manner which prejudges the appropriateness of district court jurisdiction under the facts of the amnesty cases addressed in this brief.

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39 Only in IAP and Ayuda has INS appealed portions of the merits of the district court orders.

Respectfully Submitted,

PETER A. SCHEY*
CARLOS HOLGUIN
CENTER FOR HUMAN RIGHTS
& CONSTITUTIONAL LAW
256 South Occidental Blvd.
Los Angeles, CA 90057
(213) 388-8693
*Counsel of Record for Amici

RALPH SANTIAGO ABASCAL
STEPHEN A. ROSENBAUM
PAULINE GEE
CALIFORNIA RURAL LEGAL
ASSISTANCE
2111 Mission Street, # 401
San Francisco, Ca. 94110
(415) 864-3405

WAYNE H. MATELSKI
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave. NW
Washington, D.C. 20036
(202) 857-6340

ROBERT GIBBS
GIBBS, DOUGLAS,
THEILER, DRACHLER
1613 Smith Tower
Seattle, WA 98104
(206) 623-0900

MONTE B. LAKE
McGUINESS & WILLIAMS
1015 15th Street
Suite 1200
Washington, D.C. 20005
(202) 789-8500

STEWART KWOH
ASIAN PACIFIC AMERICAN
LEGAL CENTER
1010 S. Flower St., # 302
Los Angeles, CA 90015
(213) 748-2022

WILLIAM TAMAYO
ASIAN LAW
CAUCUS, INC.
468 Bush Street
San Francisco, Ca.
(415) 487-6897

RICHARD GARCIA
CENTRO DE ASUNTOS
MIGRATORIOS
815 3rd Ave., Suite 219
Chula Vista, CA 92010
(619) 426-6620

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Attorneys for Amici Curiae